IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 706 of 1994

with

CRIMINAL APPEAL No 936 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

FARIDABHAI ISMAILBHAI MALEK

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 706 of 1994
   MR DD VYAS for Appellant
   MR KP RAVAL, APP for Respondent - STATE
2. Criminal Appeal No. 936 of 1994
   MR KP RAVAL, APP for Appellant -STATE
   MR SUNIL C PATEL for Respondent No. 1
   NOTICE Served expired during the pendency of this appeal, Respondent No.2

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 01/08/2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

1. These two appeals are arising from a common judgment, Ex.62 dated 30.06.1994 rendered by the learned Additional Sessions Judge, Valsad at Navsari (who will be referred to hereinafter as the "learned Judge of the trial Court") in Sessions Case No.84 of 1992 and, therefore, with the consent of both the parties, these two appeals are heard together and decided by this common judgment.

2. The appellant, (who is an accused No.1 in Sessions Case No.84 of 1992) in Criminal Appeal No.706 of 1994 has, by filing his appeal under Section 374(2) of the Criminal Procedure Code, 1973 (for short "Cr.P.C.") challenged the correctness, legality and validity of the aforesaid judgment, Ex.62 dated 30.06.1994, by which the appellant has been convicted for an offence punishable under Section 302 of the Indian Penal Code, 1860 (for short "I.P.C.") and is sentenced to undergo life imprisonment.

3. By the aforesaid judgment, the learned Judge of the trial Court acquitted accused Nos.2 and 3 for an offence punishable under Section 302 read with Section 114 of I.P.C. and, therefore, the State Government has challenged the said judgment, Ex.62 of acquittal rendered by the learned Judge of the trial Court, in favour of accused Nos.2 and 3 by filing its appeal being Criminal Appeal No.936 of 1994 under Section 378 of Cr.P.C.

4. The facts of the present case which emerge from the evidence on record, can be summarized as follows :-

4.1 On or about 09.06.1992, P.W.5, Rameshbhai Bhikhubhai and his younger brother Prakashbhai Bhikhubhai (deceased), both were returning from the Talkies on foot, and when they were about to reach near the house of accused No.3 Babubhai Dayalbhai Patel, they saw accused

No.1 Faridbhai Ismailbhai Malek and accused No.2 Salimbhai Rasidbhai Shaikh, standing on the Ota of the house of said accused No.3 (for the sake of convenience and brevity, the accused Nos.1, 2 and 3, will be referred to hereinafter as "A-1, A-2 and A-3," respectively).

4.2 P.W.5 Rameshbhai and Prakashbhai (deceased), while returning from the Talkies, were talking with each other. On seeing P.W.5 Rameshbhai and Prakashbhai (deceased) talking with each other, A-1 asked them as to for whom they were talking and meanwhile, A-3 had caught hold of Prakashbhai (deceased) and A-2 had caught hold of P.W.5 Rameshbhai and A-1 had inflicted two blows of knife on the body of the Prakashbhai (deceased). Out of two blows, one blow was landed on the abdominal part of Prakashbhai (deceased) and second blow was landed on his chest, as a result of which, Prakashbhai (deceased) under giddiness had fallen down on the road. At that time, P.W.5 Rameshbhai raised crises for the help, and the A-1 and A-2 ran away from that place.

4.3 It is the case of the prosecution that P.W.4 Chetanbhai Ashokbhai, who is a son of real sister of P.W.5 Rameshbhai and Prakashbhai (deceased), was passing from, nearby the house of the A-3. During the period in between 9.00 P.M. to 9.15 P.M., he saw that the accused No.3 had caught hold of his maternal uncle Prakashbhai (deceased) and the A-1 had inflicted one blow of knife on the body of his maternal uncle Prakashbhai (deceased). When, A-1 was about to inflict second blow of the knife, P.W.4 Chetanbhai went running to his mother's mother, P.W.1 Somiben Bhikhubhai. As per the say of P.W.4 Chetanbhai, his maternal uncle Prakashbhai (deceased) was not alone at the place of incident, but his another maternal uncle Ramesbhai was also with him and A-2 had caught hold of his maternal uncle P.W.5 Rameshbhai.

4.4 As per the evidence of P.W.1 Somiben Bhikhubhai, the incident took place before two years, on date 9th (Tuesday) at about 8.45 P.M. to 9.00 P.M. At that time, she was present in her house. P.W.4 Chetanbhai (son of Padmaben) came running to her and informed her "mother, Prakash Mama is being beaten". On hearing this news, she went running to the house of A-3, which is situated behind the third house from her house and on reaching the house of A-3, she saw that her son Prakash was lying near the door of the house of A-3. At that time, at about 5-6 persons had gathered there, but she could not identify them. She saw that abdominal part of Prakash (deceased) had sustained injury from which there was bleeding. She also saw that Prakash (deceased) was not speaking.

According to her, Prakash (deceased) had gone to Talkies in company of her another son P.W.5 Ramesh. On reaching the place of incident, she also found that her son Ramesh was standing nearby Prakash (deceased) and, therefore, she asked him, as to who had beaten Prakash. P.W.5 Ramesh told his mother that Prakash was beaten by Farid (A-1) and Salim (A-2) and that A-3 had caught hold of Prakash and A-1 had inflicted blows of knife. She did not find presence of the A-1 and A-2, at the said place. According to her deposition, she straightway went to Bilimora Police Station.

On or about 09.06.1992, P.W.8 Senior P.S.I. Dilipkumar Mohabbatsing Brahmbhatt was on duty in Bilimora Police Station and at night hours, police informed him that one Prakash Bhikhubhai had sustained injuries by knife in area known as "Khada" in Bilimora Town and, therefore, he went to Police Station and collected information from the P.S.O. As per the evidence of P.W.8 Sr. P.S.I., Brahmbhatt, when he was on duty, at that time, complainant Somiben was present in the Police Station and she lodged her complaint by giving names of assailants as Farid and Salim, without giving names of their fathers in her complaint. P.W.8 Sr. P.S.I, Brahmbhatt took down her complaint and sent that complaint to the P.S.O. of Bilimora Police Station for registration. P.S.O. registered that complaint, which came to be registered as C.R.No.I-86/92 for the offences punishable under Sections 307 and 305 of I.P.C. and also Section 135 of the Bombay Police Act, 1951. After the complaint of Somiben was registered, he undertook the police investigation of the said case.

4.5 From the evidence of P.W.5 Ramesh, it reveals that his sister and he took injured Prakash (deceased) in Rickshaw and brought him to Mangusi General Hospital, Bilimora at about 9.30 P.M. P.W.7 Dr.Prabhubhai Ramjibhai Tandel, who was a Chief Medical Officer of the said Mangusi General Hospital Bilimora has deposed that on or about 09.06.1992 at about 9.30 P.M., Prakash (deceased) was admitted in their Hospital for treatment. He, immediately, informed Bilimora Police Station by sending one Yadi. He had examined Prakash (deceased), and immediately started to give him medical treatment. He performed an operation of abdominal part of Prakash, and the portion of liver which sustained injury was sutured by him. That patient Prakash expired in the Hospital at about 01.35 A.M. [night] in between 09.06.1992 and 10.06.1992. As Prakash expired, he again sent one Yadi to Bilimora Police Station.

4.6 When P.W.8 P.S.I., Brahmbhatt came, after taking down the complaint of P.W.1 Somiben, he wrote one Yadi to Mangusi General Hospital, Bilimora for giving treatment to injured Prakash. He also sent one Yadi to the Executive Magistrate for recording a dying declaration of injured Prakash. He demanded a writing from the Doctor, as to whether injured Prakash was conscious and infit state of mind to give dying declaration.

4.7 Thereupon, Dr. Tandel gave one Yadi to P.W.8 P.S.I, Brahmbhatt, informed him that the patient was not conscious and that he was already taken in side operation theatre. As per the evidence of P.W.8 Sr. P.S.I. Brahmbhatt in the night in between 09.06.1992 and 10.06.1992, he inquired for the accused, but they could not be traced out. Meanwhile, he received one Yadi from Dr. Tandel of Mangusi General Hospital, Bilimora that injured Prakash had expired at 1.35 A.M. in night in between 09.06.1992 and 10.06.1992, while he was under medical treatment. On receipt of the said Yadi, he got that information registered in the station diary and he informed his superior officer and sent one Yadi to the learned J.M.F.C., Gandevi to substitute Section 302 of I.P.C. in place of Section 307 of I.P.C. in F.I.R. In the early morning on 10.06.1992, he held an inquest of deceased Prakash by drawing an inquest panchnama in the presence of two panch witnesses during the period between 7.30 A.M. and 8.30 A.M. on 10.06.1992. Thereafter, he sent the deadbody of the deceased Prakash, along with necessary documents to that very Dr.Tandel, who had treated injured Prakash for autopsy. Thereafter, he went to the place of scene of offence and drew a panchnama of the scene of offence in the presence of two panch witnesses during the period between 7.30 A.M. and 8.30 A.M. on 10.06.1992. He attached and seized control earth, blood stained earth and blood stained pair of sleepers from the place of the scene of offence. Thereafter, he recorded statements of witnesses conversant with the facts of the case. In the evening, the accused could be traced out and, therefore, by drawing an arrest panchnama, he arrested the A-1 and A-2. While, A-1 was in the police custody, he had shown his willingness to show a weapon used in the crime and, therefore, by drawing a preliminary panchnama, first he, by taking A-1 in company of two panch witnesses went to the place shown by A-1 and A-1 traced out the weapon, which was concealed by him for which a panchnama under Section 27 of the Indian Evidence Act was drawn below earlier preliminary panchnama. Thereafter, he arrested A-3 and recorded the statements of other witnesses. On or about 08.08.1992, the police had sent incriminating

articles, which were attached and seized under the panchnama to the Forensic Science Laboratory at Surat (for short "F.S.L.") for the purpose of examination and analysis. On or about 16.11.1992, on Yadi being received from police, P.W.2 Dineshchandra Mulshankar Pandya, (Ex.36) who was serving as Maintenance Surveyor in the City Survey Office at Bilimora, had gone to the place of incident, by taking with him a copy of panchnama and, thereafter, P.W.4 witness Chetan had shown him the place of incident and, thereafter, he drew a map of the scene of offence. On completion of police investigation, P.W.8 Sr. P.S.I., Brahmbhatt, filed a charge-sheet against all the three accused in the Court of the learned J.M.F.C., Gandevi on 26.08.1992. That charge-sheet came to be registered as Criminal Case No.1091 of 1992 The learned J.M.F.C., Gandevi by passing a committal order dated 21.09.1992 under Section 209 of Cr.P.C. committed the said case to the Court of Sessions, Valsad at Navsari. On or about 27.09.1992, on receipt of the case papers, that case came to be registered as Sessions Case No.84 of 1992 in the Court of Sessions, Valsad at Navsari.

5. On the basis of material on record, the learned Judge of the trial Court framed the charge Ex.1 on 09.07.1993. That charge was read over and explained to the accused. On recording their pleas, they pleaded not guilty to the charge and claimed to be tried.

6. In order to bring home the charge against the accused for which the charge Ex.1 was framed, the prosecution examined the following witnesses :-

P.W.1 Somiben Bhikhubhai (complainant) Ex.33
P.W.2 Dineshchandra Mulshankar Pandya Ex.36
(Maintenance Surveyor, who prepared
a Map of scene of offence)
P.W.3 Chetanbhai Babubhai (Panch witness Ex.38
No.1)
P.W.4 Chetanbhai Ashokbhai Ex.39
P.W.5 Rameshbhai Bhikhubhai Ex.44
P.W.6 Prakashbhai Amratlal (Panch witness Ex.45
No.2)
P.W.7 Dr.Prabhubhai Ramjibhai Tandel Ex.48
P.W.8 Dilipkumar Mahobbatsing Brahmbhatt Ex.56
(P.S.I. Bilimora Police Station)

7. The prosecution has also produced and proved certain documents such as -

1. Pursuant to Court's order Prosecution

produced three statements with a list. Ex.31
2. Map of scene of offence. Ex.37
3. Inquest panchnama Ex.40
4. Panchnama of seizure of clothes put Ex.41
on by the deceased and which were
produced by Police Constable Bhaidas
Ramdhar, B.No.1376.
5. Report of F.S.L. Ex.43
6. Injury certificate of deceased Prakash Ex.49
7. P.M. Notes. Ex.52
8. Complaint in support of their case Ex.57
against the accused.

8. After recording the evidence of the prosecution witnesses was over, the incriminating circumstances appearing against the appellants were brought to the notice of and explained to the appellants and whatever they replied to the questions put under Section 313 of Cr.P.C. were recorded below their respective pleas. All the accused have, practically, denied the case of the prosecution and their defence is of a general denial. A-1 has, in reply to the question No.12, replied to the effect that the prosecution witnesses were under wrong belief and doubt, that he was serving with A-3 and, therefore, he has been implicated in this case. He has further stated that at the time of incident, he was not present at the place of scene of offence and that he has been wrongly roped in the alleged incident. A-2, has in reply to question No.12, replied that he knows nothing about the alleged incident and that he was not present at the place, when the incident took place. He has further stated that A-1 is his brother and that the prosecution witnesses were under wrong impression and doubt that his brother A-1 was serving with A-3 and, therefore, he has been implicated in this case. A-3 has stated in his further statement that he is doing a business of liquor and that the complainant - Somiben and her sons are also doing the same business of liquor. He has further stated that the complainant - Somiben, deceased - Prakash and Ramesh are doing a business of liquor and, therefore, he has been, wrongly, implicated in this case. It is his defence that on the date of incident, he, Ranchhod, Ishvar, Munna and other persons were talking with each other in his house and in the meanwhile, he heard the cries from behind his house and, therefore, all they had gone there at the place from where they heard the cries and they saw that Prakash was lying on the ground and he was injured on his abdominal portion, from which there was bleeding. He has further stated that thereafter, he called Rickshaw and the relatives of Prakash (deceased) came there and they took Prakash (deceased) in Rickshaw

to the Hospital. Thereafter, he went to his house and on the next day, he had attended funeral ceremony of Prakash. None of the accused has led his evidence in his defence and none of the accused examined himself as witness in his defence. None has produced any documentary evidence to substantiate his defence. Still, however, from the record, it appears that, A-1 and A-2 got produced certain documents with the list Ex.34 on their behalf, in the cross-examination of complainant Somiben. From the record, it also appears that on 06.04.1994, A-1 and A-2 produced certain documents with the list Ex.46 in their defence. The learned Judge of the trial Court, thereafter, heard the arguments of the learned advocates for both the parties and, thereafter, on making examination, scrutiny and appreciation of the evidence, came to a conclusion that on 09.06.1992, Prakash Bhikhubhai died homicidal death and further that, he died as a direct result of infliction of blows of knife made by A-1 and, therefore, he has given a finding that A-1 has committed an offence of murder punishable under Section 302 of I.P.C. The learned Judge of the trial Court has further come to a conclusion that the prosecution failed to prove the case against the A-2 and A-3 beyond reasonable doubt that they abetted A-1 in committing the murder of Prakash and, therefore, the learned Judge of the trial Court gave finding on the point No.3 in the negative. He also gave a finding that the prosecution failed to prove beyond reasonable doubt the case against all the accused for committing an offence punishable under Section 135 of Bombay Police Act for contravention of notification issued under Section 37(2) of the Bombay Police Act. On the basis of the aforesaid findings, the learned Judge of the trial Court, by rendering his judgment Ex.62 dated 30.06.1994 in aforesaid Sessions Case No.84 of 1992 convicted the accused No.1 for an offence punishable under Section 302 of I.P.C. for which he sentenced the accused No.1 to undergo life imprisonment. By the said judgment, he acquitted accused Nos.2 and 3 for an offence punishable under Section 302 read with Section 114 of I.P.C. Though he gave a finding on the point No.4 in the negative, with regard to an offence punishable under Section 135 of the Bombay Police Act, he has not passed any order of acquittal for that offence in favour of the accused.

9. Being aggrieved against and dissatisfied with the said judgment of conviction and sentence, so far as it relates to accused No.1 is concerned, the appellant / accused No.1 has filed Criminal Appeal No.706 of 1994. The State Government has, by filing Criminal Appeal No.936 of 1994 challenged the judgment of acquittal

rendered in favour of accused Nos.2 and 3.

10. We have heard Mr.D.D.Vyas, learned senior advocate for the accused No.1 (Appellant of Criminal Appeal No.706 of 1994) and Mr.Sunil C. Patel, learned advocate (respondent No.1 of Criminal Appeal No.936 of 1994). From the record, it appears that notice of this appeal, after it was admitted was served upon accused No.3 (respondent No.2 of Criminal Appeal No.936 of 1994) and when that notice was served on accused No.3, he had stated that he would engage his private advocate for his defence in acquittal appeal filed by the State Government. From the record, it appears that no advocate has filed any Vakalatnama for the said accused No.3. On 22.07.2003, Mr.K.P.Raval, learned APP for the State, under instructions, has made a statement at the Bar that accused No.3 i.e. respondent No.2 of Criminal Appeal No.936 of 1994, has already died of heart-attack on 27.12.1996. Mr.K.P.Raval has tendered a letter of Senior Police Inspector of Bilimora Police Station dated 22.07.1993. It is taken on record. In view of this fact that accused No.3 has already expired during the pendency of this appeal, Criminal Appeal No.936 of 1994, so far as it is filed against the accused No.3 stands abated under Section 394 of Cr.P.C. In view of this, now Criminal Appeal No.936 of 1994 remains to be decided for respondent No.1 / accused No.2, only.

11. Mr.D.D.Vyas, learned senior advocate for the accused No.1 (Appellant of Criminal Appeal No.706 of 1994) and Mr.Sunil C. Patel, learned advocate for accused No.2 (respondent No.1 of Criminal Appeal No.936 of 1994) have taken us through the evidence in its entirety. Mr.K.P.Raval, learned APP for the State has taken us through the impugned judgment, which is challenged in these two appeals.

12. Mr.D.D.Vyas, learned senior advocate for the accused No.1 (Appellant of Criminal Appeal No.706 of 1994) has assailed the judgment on the following counts.

[A] The learned Judge of the trial Court has not correctly appreciated evidence in its proper prospective.

[B] The evidence of complainant - Somiben is quite contradictory to the evidence of P.W.5 Ramesh and that both these witnesses have tried to make improvement in their evidence in contradiction with the complaint of Somiben and police statements.

[C] P.W.1 complainant - Somiben, P.W.4 Chetan and

P.W.5 Ramesh are highly interested witnesses because they are closely related to the deceased Prakash and, therefore, in absence of any evidence of independent witnesses, the evidence of such interested witnesses should be discarded and if not that evidence should be scrutinized with care and caution.

[D] The complainant - Somiben and her sons were doing the illegal business of liquor and so many cases were filed against them in the Court and, therefore, these witnesses are not respectable witnesses and, therefore, their evidence should not be accepted blindly.

[E] As per the evidence of P.W.7 Dr.Tandel, after admitting injured Prakash in the Mangusi General Hospital, Bilimora, he had, by sending a Yadi Ex.50, informed Bilimora Police Station about the incident and it was received by P.S.O. of Bilimora Police Station at 21.45 hours. Mr.Vyas has argued that this Yadi Ex.50 is a First Information Report and in no case alleged complaint Ex.57 can be said to be F.I.R. He has further argued that looking to the evidence of P.W.8 Sr. P.S.I. Brahmbhatt, police had informed him that one Prakash Bhikhubhai was injured in area known as "Khada" in Bilimora town and, therefore, first he went to Bilimora Police Station and collected information from P.S.O. and at that time, he took a complaint Ex.57 from the complainant - Somiben, who was present in the Police Station. Mr.D.D.Vyas has argued that the complaint Ex.57 is not an F.I.R., but it is simply a police statement recorded under Sections 161, 162 of Cr.P.C.

[F] Mr.Vyas has argued that in the complaint Ex.57, Somiben, at the earliest point of time, informed the police that on the date of incident, her two sons Ramesh and Prakash had gone for a walk in the evening and after preparing meals, she was waiting for them and meanwhile, one boy residing in her neighbourhood, came to her and informed her that Prakash (deceased) had sustained injury by infliction of blows of knife in the quarrel and, therefore, she rushed, in company of that boy, to the place, shown by that boy and she saw that her son Prakash (deceased) was lying on the ground and that he had sustained injuries on chest and abdominal part from which there was a bleeding. Mr.Vyas has argued that she did not know the name of the boy, who had come to her, when she lodged the complaint but she has changed her version in deposition by saying that Chetan son of her daughter Padmavati came to her and informed her about the alleged incident. Mr.Vyas has argued that looking to this major contradiction in nature of improvement, the evidence of

complainant Somiben should be discarded. He has further argued that from the evidence of complainant Somiben, it appears that P.W.4 Chetan is a chance witness and, therefore, the evidence of P.W.4 Chetan should also be discarded.

[G] Mr.Vyas has argued that so called eye witness P.W.5 Rameshbhai elder brother of the deceased Prakash is also not trustworthy and reliable witness, because his evidence is full of major contradictions and embellishment, which go to the root of case. In examination-in-chief, he did not state that at the time of incident, P.W.4 Chetan was seen by him.

[H] It is the case of the prosecution that some knife was used as a weapon in the crime, while I.O. has given his evidence that at the instance of accused No.1, a weapon was traced out and that weapon is a dagger, which is described in Item No.8 in report Ex.43 of F.S.L. and thus, there is a major contradiction in weapon used and weapon discovered. Mr.Vyas has argued that the prosecution has not proved that the alleged panchnama was drawn under Section 27 of Indian Evidence Act. In absence of any panchnama, that evidence, with regard to discovery of dagger cannot be considered. With regard to weapon, the prosecution has not brought the real version on the record.

[I] The police statement of P.W.4 Chetan was recorded, after a long delay, on 11.06.1992 and for that delay, the prosecution has not tendered any explanation.

[J] From the evidence of P.W.8 Sr. P.S.I. Brahmbhatt, it appears that he had recorded the statement of another alleged eye witness on 10.06.1992. For other witnesses Amrat, Champak and Chetan, he had called them but that witnesses had informed him that they would give their statements, after consulting their advocate. In view of this fact the evidence of Champak is a doubtful evidence, because he gave his statement, which suited to prosecution after consulting his advocate. He has further argued that looking to this evidence of Sr. P.S.I. Brahmbhatt possibility of alleged eye witness Ramesh, giving statement after consulting his advocate cannot be ruled out.

[K] Mr.Vyas has argued that the conduct of complainant is most unnatural because after reaching the place of incident, she did not accompany injured Prakash, when he was being shifted to Hospital, but she straightway went to the Police Station and lodged her

complaint. As per evidence of P.W.5 Ramesh, the incident took place in between 8.30 P.M. and 9.30 P.M. on 09.06.1992 and, therefore, Somiben mother of injured Prakash, must have reached the place of incident by 9.30 P.M. or at the best at 9.45 P.M. and then she went to Police Station. Herein this case, she lodged her complaint in Bilimora Police Station at about 22.30 hours on 09.06.1992. The delay caused in lodging complaint Ex.57 by her is not explained by the prosecution.

[L] From the evidence of P.W.5 Ramesh, on raising cries after assault was launched on his younger brother, about 8-10 persons had gathered there. The prosecution has not examined any independent witness though available, and hence, adverse interference be drawn.

[M] Lastly, Mr.Vyas has argued that the prosecution has not proved the case against the accused No.1 beyond reasonable doubt and, therefore, the accused No.1appellant be acquitted by allowing his appeal.

13. Mr.Sunil C. Patel, learned advocate for the respondent No.1, in Criminal Appeal No.936 of 1994 filed by the State Government, has supported the judgment of the acquittal rendered in favour of his client accused No.2. He has argued that the scope, ambit and powers of this Court, while hearing the acquittal appeal, are circumscribed and when this Court finds that the learned Judge of the trial Court has assigned cogent and convincing reasons for acquitting accused Nos.2 and 3, this Court cannot substitute its own finding in place of finding arrived at by the learned Judge of the trial Court. He has argued that the appeal qua respondent No.1 / accused No.2 preferred by the State Government, is devoid of merits and the same requires to be dismissed.

14. Mr.K.P.Raval, learned APP for the State of Gujarat has supported the impugned judgment through out. He has argued that P.W.4 Chetan and P.W.5 Ramesh are eye witnesses and before their own eyes, the incident took place. He has further argued that merely because, the two witnesses are near relatives of the deceased Prakash, their evidence cannot be brushed aside so lightly, as argued by learned senior advocate for the appellant / Accused No.1. It is his submission that on the contrary, near relatives would like to see that the real culprit is booked and punished and no innocent person is involved. He has further submitted that there is nothing on record to show that there was any enmity in between P.W.4 Chetan and P.W.5 Ramesh, on one side and the appellant / accused No.1 Farid on other side. He has further argued that the

complainant Somiben has filed her complaint at the earliest point of time and, therefore, there cannot be any ground to suspect the complaint on the ground of delay. He has further argued that the learned Judge of the trial Court has correctly appreciated the evidence on record in its proper perspective and has come to a right conclusion. Lastly, he has submitted that the appeal being Criminal Appeal No.706 of 1994 filed by the appellant / accused No.1 is devoid of merits and, therefore, it should be dismissed, by confirming the judgment of the learned Judge of the trial Court.

For Criminal Appeal No.936 of 1994 filed by the State against the accused Nos.2 and 3. Mr.K.P.Raval has argued that the learned Judge of the trial Court has placed reliance on the evidence of P.W.4 Chetanbhai and P.W.5 Ramesh, for holding A-1 guilty to the alleged offence and at the same time, he has disbelieved the said two eye witnesses for the case of the prosecution so far as it relates to accused Nos.2 and 3. He has further argued that the learned Judge of the trial Court has not properly assessed the evidence for deciding the case against the accused Nos.2 and 3. He has argued that looking to the evidence on record, the prosecution has ably proved the case against the accused Nos.2 and 3, beyond reasonable doubt. As discussed earlier, the A-3 has expired during the pendency of Criminal Appeal No.936 of 1994 and, therefore, that appeal stands abated against the respondent No.2 (accused No.3). Lastly, Mr.Raval has argued that the respondent No.1 (accused No.2) be convicted and sentenced in accordance with law, by allowing the appeal preferred by the State of Gujarat.

15. We have dispassionately considered the submissions of the learned advocates appearing for both the parties. We have carefully and minutely examined and re-appreciated the evidence on record to come to our own conclusions to decide these two appeals. We have perused the impugned judgment, which is challenged in these appeals and also examined the record and proceedings of the case, which have been called for from the trial Court.

16. During the course of arguments, the learned advocate for the appellant / accused No.1 of Criminal Appeal No.706 of 1994 and the learned advocate for the respondent No.1 of Criminal Appeal No.936 of 1994 have not seriously challenged the finding of the learned Judge of the trial Court regarding homicidal death of deceased Prakash. Still, however, for our satisfaction, we have examined the relevant evidence on this point. The

prosecution has produced and proved an inquest panchnama Ex.40. As per this inquest panchnama Ex.40, Prakashbhai Bhikhubhai Patel (deceased) had sustained serious injuries and there were two wounds, one on chest admeasuring 3 c.m. x 1 c.m. and another on right side of abdominal part of size of 2 c.m. X 1 c.m. There is a reference of cut mark in length of 12 c.m. on abdomen and it was found sutured, after operation was performed.

17. The prosecution has examined P.W.7 Dr.Tandel, who had treated injured Prakash. He has deposed in his evidence that on or about 09.06.1992, he was working as Chief Medical Officer in the Mangusi General Hospital, Bilimora and on that day, at about 9.30 P.M. one Prakash of Bilimora was admitted in his Hospital for treatment. He has further deposed that he has examined that person and found the following injuries.

[1] Punctured wound of size of 3 cm x 1 cm x 10 cm on the left side of the chest just below fifth rib.

[2] Punctured wound of size of 2 cm x 1 cm x 10 cm on the right side of abdominal part.

17.1 He has also deposed that both wounds were on the front side of the body of the injured Prakash and there was profuse bleeding from the wounds. He has further deposed that patient himself has said that he was injured with the knife blows and at that time, the patient was conscious. For the injuries seen by him, he has proved the certificate Ex.49. He has further deposed that he, immediately, started to give medical treatment to injured Prakash, for which he was taken inside the operation theatre and operation was performed on the abdominal part of injured Prakash. He has further deposed that injured portion of liver was sutured by him and after operation, the said patient expired at 1.35 A.M. He was shown muddamal article No.7 knife and on seeing that knife, he has opined that the aforesaid two injuries could be possible by this knife. He has further deposed that after admitting this patient, he had informed Bilimora Police Station, by sending one Yadi Ex.50. He has further deposed that after patient was expired, he again informed Bilimora Police Station by sending another Yadi Ex.51.

He has further deposed that on 10.06.1992, he received written Yadi for performing a postmortem of the deadbody of deceased Prakash, along with a copy of an inquest panchnama and other prescribed form. He started to perform postmortem of the deadbody of deceased Prakash

at 11.45 A.M. on that very same day. As per his deposition, he had noticed the following external injuries, which he had noted down in Column No.17 of postmortem notes Ex.52.

[1] Sharp incised punctured wound over Lf. side of chest in fifth intercostal space in interior axillary line, size 3 x 1 x 10 cm.

[2] Sharp incised punctured wound over Rt. hypochondrium size 2 x 1 x 10 cm.

[3] Laparotomy incision in Rt. paramedian of 12 cm long.

Edge of both wounds (1) & (2) are elliptical.

He has further deposed that he had scene the following internal injuries.

HEAD :
[1] Brain : congested.
THORAX :
[1] Pleura : Large left heamothorax.
[2] Larynx, Trachea and Bronchi : congested.
[3] Right Lung : congested.
[4] Left Lung : Piercing wound through and through in middle of left lung with partial cut in pale artery with collapse.
[5] Heart : congested.
ABDOMEN :
[1] Stomach and its contents : undigested food material without smell of alcohol.
[2] Liver (with weight) - : incised wound over and gall inferior profuse of bladder liver.
[3] Bladder : partially filled.

17.3 After narrating the aforesaid injuries, he has opined that all the aforesaid injuries were antemortem. He has further opined that internal injuries in the lungs were due to injury caused on the chest portion and internal injuries on liver were due to external injuries caused on the abdominal part. He has given his opinion for cause of death of Prakash in para-23 as follows :

"Haemorrhagic shock due to large heamothorax and

haemoperitoneum following stab injury."

17.4 He has further deposed that the aforesaid injuries were sufficient to cause the death of Prakash in ordinary course of nature. He has proved the postmortem notes Ex.52. In the cross-examination, Dr.Tandel has deposed that undigested food material was found in the stomach of deceased Prakash and that the patient must have taken the food three to six hours before the death. He has further deposed in his cross-examination that when that patient was brought in the Hospital, one or two persons had accompanied him. Thus, the prosecution has, by producing an inquest panchnama Ex.40 and sufficient medical evidence together with postmortem notes Ex.52, proved the factum that Prakash died homicidal death. We find no reason or material to differ from the said view taken by the learned Judge of the trial Court and, therefore, we uphold the finding of the learned Judge of the trial Court that the Prakashbhai Bhikhubhai died homicidal death.

18. Now, this takes us to consider the evidence as to who was an author of the said two injuries noticed by Dr.Tandel. As per the case advanced by the prosecution, on or about 09.06.1992, P.W.5 Ramesh and his younger brother deceased Prakash, both were returning from the Talkies and when they reached near the house of accused No.3 Babubhai, they saw that A-1 and A-2 were standing on the Ota of the house of the accused No.3. As they both were talking with each other, while coming from the Talkies, the A-1 Farid doubted that the said two persons were talking for him and, therefore, A-1 Farid asked P.W.5 Ramesh and Prakash (deceased) as to for whom, they were talking with each other and meanwhile, A-3 had caught hold of Prakash (deceased) and A-2 Salim had caught hold of P.W.5 Ramesh and A-1 Farid inflicted two knife blows on the body of Prakash, out of which one caused injury on the abdomen and other on the chest. As deposed to by P.W.5 Ramesh, Prakash (deceased) had fallen down on the road by suffering from giddiness and, thereafter, he raised cries and, therefore, A-1 Farid and A-2 Salim, both had fled away from that place of the incident. This is the case of the prosecution, for connecting A-1 Farid with the crime and the case against the A-2 Salim for connecting him with the case of abetting the A-1 Farid in committing the murder of Prakash.

To prove this case, the prosecution has placed reliance on evidence of P.W.4 Chetan and P.W.5 Ramesh. The prosecution has also placed reliance on the evidence

of P.W.1 Somiben, who lodged her complaint in Bilimora Police Station.

19. P.W.1 Somiben has deposed that she has got four sons ; eldest is Amrut, second is Champak, third is Ramesh and youngest is deceased Prakash. She has further deposed that she has got one daughter Padma, who is married and staying in the house, on the side of her house and that husband of Padma is Ashokbhai Sukkar and Chetan is a son of her daughter Padma. For incident, she has deposed that the incident in respect of Prakash took place on 9th date and it was a Tuesday and it took place in between 8.45 P.M. and 9.00 P.M. She has deposed that when she was present in her house, one boy Chetan came running to her and informed her that "Prakash Mama is being beaten" and, therefore, on hearing that news, she went running towards the house of A-3 Babu Dayal and she saw that her son Prakash was lying in front of entrance of the house of A-3 Babu. She also saw that 5-6 persons were present there at the place of incident, but she could not identify any of them. She has further deposed that Prakash had sustained injuries on both the sides of abdomen and, there was bleeding from that part where the injuries were noticed by her. She has further deposed that Prakash was not speaking. She has further deposed that Prakash in company of her another son Ramesh had gone to Talkies. She has further deposed that when she reached the house of A-3 Babu, she saw that Ramesh was standing nearby injured Prakash and, therefore, she asked Ramesh as to who had beaten Prakash. She has further deposed that thereupon Ramesh informed her that Farid and Salim had beaten Prakash and that he further informed her that Farid had inflicted knife blows, while Salim had caught hold of Prakash. She has further deposed that she did not find presence of said two accused. She has further deposed that she straightway went to Bilimora Police Chowki and simultaneously, her daughter and son took Prakash to the Hospital. She has further deposed that after reaching the Police Station, she informed that her son was injured by knife blows. She has further deposed that she had given names of assailants, but police did not take down that information, which she gave in the police station. At the next breath, she changed her story and said that on the first day, when she went to police, the police took down the facts as stated by her. She has proved her complaint, which has been exhibited at Ex.57, after recording the evidence of I.O. P.W.8 Brahmbhatt. She has further deposed that after lodging the complaint, she went to Hospital and she found that her son was alive, but he was unconscious. She has further deposed that on that very night, Prakash expired

during the period between 1.00 A.M. and 1.30 A.M. It is her case that she knows A-1 Farid and A-2 Salim, as both are serving with A-3 Babubhai. As per her deposition, A-3 Babubhai is a son-in-law of her sister and that A-3 Babubhai is selling foreign liquor. She identified all three accused before the trial Court. She has further deposed in her examination-in-chief that when she went to Hospital, her three sons, daughter and Chetan son of her daughter were present and she inquired from Chetan, as to who had beaten Prakash and thereupon Chetan informed her that Farid (accused No.1) had beaten Prakash Mama. As per her deposition, Chetan informed her that persons were exchanging words and in that incident, the knife blows were inflicted. She has admitted that she did not ask Chetan about Salim. She also asked Ramesh and on other day, Ramesh gave two names of accused Farid and Salim. She has further deposed that thereafter, on the next day, Ramesh gave name of A-3 Babubhai Dayalbhai and informed her that Babubhai (A-3) had caught hold of deceased Prakash from his behind and Farid had inflicted knife blows from front side.

19.1 In the cross-examination, she has admitted that she is also doing a business of selling liquor. The learned advocate for the accused Nos.1 and 2 got produced certain documents with the list Ex.35, in the cross-examination of P.W.1 Somiben. Ex.35 is an order passed by Sub-Divisional Magistrate, Navsari against Somiben, in continuation to complaint under Section 93 of the Bombay Prohibition Act. She has deposed in para-9 of her cross-examination that when she went to Police Station on 9th (i.e.09.06.1992), the police did not record her complaint as per her dictation, but police had informed her that they would write down the complaint. She has also deposed in para-10 of her deposition that she went to Police Chowki on foot and one would take 15 to 20 minutes on reaching Police Chowki, on foot. She has deposed that first of all, she did not go to Hospital, but she went to Police Chowki and Mangusi General Hospital is situated there in between the way, if one would go to Police Chowki, on foot. She has also deposed in her deposition that Ramesh did not inform her about the incident in the Hospital, but he informed her about incident at her house. She has also admitted in para-14 of her cross-examination that Ramesh gave information about involvement of A-3 on the next day. She has further admitted that after coming to her house, Chetan informed her that the quarrel had taken place with Prakash and he had been injured by knife. She has also admitted in her deposition that whatever information was given by Ramesh to her, was given by her to the police in

the police station. She has also admitted that it was true that Ramesh did not give the name of A-3 Babubhai and, therefore, she did not mention the name of A-3 in her complaint.

20. P.W.4 Chetanbhai Ashokbhai, Ex.39 has deposed in his evidence that deceased Prakash was his maternal uncle and that he is residing in the area known as "Khada" in Bilimora and that his house is situated on the side of house of her grandmother Somiben. He has further deposed that he knows A-3 Babubhai, as his (A-3's) house is situated in front of his house. With regard to the incident, he has deposed that the incident in respect of Prakash Mama took place during the period between 9.00 P.M. to 9.15 P.M. on 09.06.1992 and at that time, he was passing from the place of incident and that the incident took place near the house of A-3 and he saw that Babubhai had caught hold of his Prakash Mama and A-1 Farid had inflicted one knife blow and when Farid was about to inflict second knife blow, he went running to his grandmother and informed her about the incident. As per his say, Farid inflicted first blow on the abdominal part of Prakash (deceased) and at that time Prakash Mama was not alone, but his another maternal uncle Ramesh Mama was with his Prakash Mama. For involvement of A-3, he has deposed that Babu Dayal (A-3) had caught hold of Prakash Mama, while Salim had caught hold of his Ramesh Mama. He has further testified in his evidence that after reaching the house of his grant-mother, he informed his grandmother that "Mother, Prakash Mama is being beaten" and further he had given the name of Farid (A-1) and Salim (A-2). He has deposed that as he was frightened, he did not give the name of Babu Dayal. He has, then, informed the trial Court that thereafter, his grandmother and he (Chetan) both went running to the place where his Prakash Mama was lying in injured and bleeding condition, on the road and, thereafter, he informed his mother Padmaben. He has further deposed that when he reached the place of incident, his Prakash Mama was already taken away from the place of the incident to the Hospital. He has identified muddamal article No.7 - knife and said that with this knife, his Prakash Mama was injured. He has further deposed that there was a wall at the place, where his Prakash Mama was injured and there was a road on which persons were passing. He has further deposed that there was an electric tube light on the road.

20.1 In the cross-examination, he has deposed that his statement was recorded on 11th (i.e. 11.06.1992). He has admitted that about 10-15 persons had gathered at the

place of incident and amongst them, there were Devendrakumar, Raju, Munno, Ishvarbhai Naginbhai, Ranchhodbhai, Chillubhai, Shankarbhai Jinabhai. He has further deposed in his cross-examination that when Faridbhai was beating Prakash Mama, and Babu Dayal was standing near the wall, Salim had caught hold of Ramesh at some distance. This witness had clarified that the distance was of about 7 feet. He has denied the suggestion that he did not see any incident and he had received only information. He has further deposed that he has deposed falsely about the alleged incident at the instance of his grandmother and other maternal uncles. He has further deposed in his cross-examination that he has studied upto 8th Standard and that when police had recorded his statement, he was quite normal and not frightened. In the cross-examination, in para-10, he has admitted that when he was playing, he reached near the place of incident and at that time, he heard the exchange of words in altercation, which was being taken place in between Farid and Prakash Mama and he stood there, for about five minutes. He has denied the suggestion that Babu Dayal (A-3) was not there at the place of incident and he was giving the name of Babu Dayal at the instance of his Ramesh Mama.

21. As per the case of the prosecution, P.W.5 Rameshbhai Bhikhubhai, elder brother of the deceased Prakash was an eye witness of the incident. He has deposed that the incident took place at about 8.30 P.M. to 9.15 P.M. and when he and Prakash were returning from the Talkies, he saw that Farid (A-1) and Salim (A-2) were standing on the Ota of the house of Babu Dayal (A-3) and he and his younger brother Prakash were returning on foot, talking with each other. He has further deposed that as they were talking with each other, Farid asked as to for whom they were talking with each other and in the meanwhile, Babu (A-3) had caught hold of Prakash and he was caught hold by Salim (A-2) and Farid (A-1) had inflicted two knife blows on the body of Prakash and that one of the two knife blows, was landed on abdomen and another was landed on chest, as a result of which Prakash was suffering from giddiness and he had fallen down on the road. He has deposed that as he raised cries, Farid (A-1) and Salim (A-2) fled away from the place of incident. He has further deposed that at about 10-12 persons had gathered there. He has further deposed that on hearing that cries, his brother, his sister, his mother and other family members rushed to the place. He has further deposed that amongst his family members, his brothers Amrat, Champak, his sister Padma, his mother Somiben and Chetan son of his sister had rushed to the

place of incident. He has further deposed that his mother asked him about the incident and, thereupon, he informed his mother that Babu Dayal (A-3) had caught hold of Prakash and Farid (A-1) had inflicted knife blows. He has further deposed that he, his sister and other brothers shifted Prakash in Rickshaw to the Hospital and his mother went to the Police Station. He has further deposed that Prakash was made to lie in Rickshaw and at that time there was bleeding from abdominal part and chest and his clothes had stained with blood. He has further deposed that as he, by lifting Prakash, put him in Rickshaw, his own clothes had stained with blood. He has further deposed that in Rickshaw his brothers Amrat, Champak and his sister Padma accompanied him and their clothes had also stained with blood. He has further deposed that Prakash was admitted in Government Hospital and he expired in the Hospital during the period in between 1.30 A.M. and 1.45 A.M. He has identified pantaloon and sleepers worn by Prakash and muddamal knife. He has further deposed that on the next day, a panchnama of the scene of an offence was drawn. He identified the accused, who were present in the Court. He has admitted that Babu Dayal, was a son-in-law of his maternal aunt, and that he knew Farid and Salim as both were working with Babu Dayal.

In para-6 of his examination-in-chief, he has categorically admitted that there was no reason for occurrence of this incident and that there was neither any quarrel nor fight.

21.1 In the cross-examination, he has also admitted that they had to take meals at their mother's house and Prakash was not given any food when he was in the Hospital. He has denied the suggestion that he was not present at the place of incident. In para-9 of his deposition, he has testified that the incident lasted for about 2-3 minutes and within 5 minutes, other persons had rushed there. He has further deposed that after other persons reached there at the place of incident, they took Prakash, by putting him in Rickshaw to the Hospital and for taking Prakash to the Hospital, the period of five minutes might have elapsed. He has further deposed that when knife blows were inflicted, he was at the distance of 2-3 spaces from Prakash and further that other persons were residing near by that place. In the cross-examination, he has admitted that Farid asked Prakash as to who was being teased by him and, thereafter, verbal altercation took place. He has admitted in para-11 of his deposition that police recorded his statement on 10th in between 10.00 A.M. and

10.30 A.M. at Police Chowki. He has also admitted that his police statement was recorded, after 18 hours. He has also admitted, in his cross-examination that when the incident took place, five persons were present there at the place of incident and out of that five persons, they two brothers were there and three accused were there. Though he did not state in examination-in-chief, he stated in his cross-examination that he saw Chetan at the time of incident.

22. Considering the aforesaid evidence, it is crystal clear that the complainant Somiben was not an eye witness to the incident. She was informed by P.W.4 Chetan. As per the case of the prosecution, elder brother Ramesh, P.W.5 was an eye witness to the incident and, therefore, the entire case rests on evidence of P.W.5 Ramesh and P.W.4 Chetan. Before appreciating their evidence, it is necessary to note the background of Somiben and his sons. They have categorically denied that they are involved in the prohibition cases. A-1 and A-2 have got produced certified copy of order Ex.35, in the cross-examination of Somiben. This Ex.35 being certified copy of order under Section 93 of the Bombay Prohibition Act, passed by the Sub-Divisional Magistrate, Navsari directing Somiben to furnish a P.R. bond with surety of Rs.500/--. A-1 and A-2 have also produced one another certified copy of order passed under Section 93 of the Bombay Prohibition Act with list Ex.46. Mark 46/1 is a certified copy of an order. We find no hesitation to place reliance on this certified copy. As per this copy of order Mark 46/1, Somiben was involved in about three prohibition cases. From the record and proceedings, it also appears that the learned Judge of the trial Court directed the prosecution to produce certain statements and pursuant to that order, the prosecution produced three different statements with the list Ex.31. First statement in respect of Somiben shows that Somiben was involved in about 12 prohibition cases. Second statement shows that deceased Prakash was involved in about 10 prohibition cases and one I.P.C. case. Third statement shows that P.W.5 Ramesh was also involved in one prohibition case. A-3 has categorically admitted in his further statement that he is doing a business of liquor and that Somiben and her sons are also doing the same business of liquor. It is argued by Mr.D.D.Vyas, learned senior advocate that because of rivalry in business, the name of A-3 was given. A-1 and A-2 have stated in their further statements that the prosecution witnesses were under belief and doubt that they were serving with A-3 and, therefore, their names are given by them. Thus in this case, Somiben (P.W.1), Chetan (P.W.4) and Ramesh (P.W.5) are not respectable witnesses.

On the point with regard to motive, the prosecution has come with a case that deceased Prakash and Ramesh, while returning from the Talkies to their residence they were talking with each other and when they reached near the house of A-3, they saw A-1 and A-2 standing near the Ota of A-3 and Farid had inquired from them as to for whom they were talking with each other and from only that talk, the unfortunate incident took place. A-3 had caught hold of Prakash (deceased) and Farid (A-1) had inflicted knife blows. It does not stand to reason to accept this alleged motive, because from mere inquiry by A-1 as to for whom they were talking, no such serious type of incident could take place. From the evidence, it appears that the prosecution wants to hide something. P.W.4 Sr. P.S.I. Brahmbhatt, who recorded the statement of Chetan (P.W.4) has stated in para-11 of his deposition that he recorded the statement of Chetan (P.W.4) wherein Chetan had stated before him that in this incident, he had come to know from Ramesh Mama that unnecessary quarrel took place with Prakash Mama by Farid and Salim. There is no evidence as to what was that quarrel. P.W.5 Ramesh has categorically admitted in para-6 of his deposition that there was no cause for occurrence of this incident and that there was neither fight nor quarrel from their side. If this is the fact situation, from mere incident of coming Prakash and Ramesh from the Talkies on foot, talking with each other, no sane person would kill the deceased Prakash with knife. In deposition of P.W.8 Sr.P.S.I. Brahmbhatt, he has deposed that he had recorded the statements of certain witnesses and from statements of that witnesses, it was revealed that the witnesses were standing near pakka built house of accused No.3 at about 9.00 P.M. and there was a quarrel near another house of A-3, which was situated just in the inner side and on hearing the shout and voice of quarrel, they rushed at that place and saw Prakash (deceased) lying in injured and bleeding condition and he had fallen down on the ground and at that time A-3 had helped Prakash to make him standing. It also reveals that A-3 asked other persons to call Rickshaw and, thereafter, the relatives of Prakash (deceased) took him to the Hospital.So from the evidence of P.W.8 Sr.P.S.I. Brahmbhatt, it appears that something had happened before the incident and in that incident, there was a quarrel in between Farid and Prakash. There is nothing on record as to what was the nature of and purpose for that quarrel. Therefore, P.W.4 Chetan and P.W.5 Ramesh, both are hiding some important facts with regard to genesis of the incident. Looking to the background of the witnesses and the business of A-3 and the prosecution witnesses,

possibility of rivalry in business, cannot be ruled out. A-3 is a son-in-law of sister of Somiben. He is also doing the same business of liquor. According to the evidence of P.W.8 Sr.P.S.I. Brahmbhatt, A-3 did not flee away from the place, but on the contrary, he tried to help the deceased Prakash to make him standing. As per the evidence of P.W.4 Chetan, he did not give the names of Farid and Salim to her grandmother, but he only informed his grandmother that Prakash Mama was being beaten. Had P.W.4 Chetan seen the accused at the place of incident and seen the actual occurrence of incident, he would have certainly stated the names of A-1 and A-2 to her grandmother. On receiving the information from P.W.4 Chetan, Somiben rushed to the place and saw that Ramesh was there and she inquired from Ramesh as to what had happened. P.W.5 Ramesh has deposed that on being asked by his mother, he informed his mother that Babu Dayal (A-3) had caught hold of Prakash and Farid had inflicted knife blows. After receiving this information, Somiben went to the police station and lodged her complaint but she did not give the name of accused No.3 in her complaint, Ex.57. The complaint is filed only against A-1 and A-2. From the evidence, it appears that for the first time, the name of A-3 was disclosed by P.W.5 Ramesh on 10.06.1992 and, thereafter, the police investigation proceeded further on the line as per say of P.W.5 Ramesh. P.W.5 Ramesh has admitted in para-11 of his deposition that it was not true that he stated before Police that his mother rushed to the place of incident within five minutes and at that time he did not inform his mother that Babu (A-3) had caught hold of Prakash. Thus, on this point, the evidence of Somiben and P.W.5 Ramesh is quite contradictory. If, really P.W.5 Ramesh had informed his mother with regard to A-3, she had no reason for not stating the name of A-3 in her complaint Ex.57. In view of this, according to us, the prosecution witnesses have tried to involve A-3 falsely. Under the circumstances, their evidence is of highly doubtful. If a person can involve one innocent person in the case subsequently, possibility of involving other two accused in the case falsely, cannot be ruled out.

23. Mr.D.D.Vyas, learned senior advocate for the appellant has vehemently argued that Ex.57, which was lodged by Somiben, cannot be said to be a First Information Report, as per the provisions of Section 154 of Cr.P.C. He has argued that in view of the evidence of P.W.7 Dr.Tandel, the injured Prakash was brought to Mangusi General Hospital, Bilimora at 9.30 P.M. on 09.06.1992 and he examined him (injured Prakash) and he noticed injuries mentioned in Medical certificate Ex.49

issued by him. He has deposed that immediately after admitting that injured person, he informed Bilimora Police Station by written Yadi, which is at Ex.50. Mr.Vyas has argued that on receipt of this Yadi Ex.50, police machinery came into motion, as a result of which P.W.8 Sr. P.S.I. Brahmbhatt went to police station and he found that complainant P.W.1 Somiben was present in the police station and, therefore, he took down the complaint Ex.57 of Somiben. Mr.Vyas has argued that Yadi Ex.50 is in real scene a F.I.R. and it should be treated as F.I.R. under Section 154 of Cr.P.C. On reading Ex.50, we find that Dr.Tandel informed P.S.I. Bilimora that one Prakash, aged about 24 years, resident of "Khada" Bilimora, who had sustained injuries in a scuffle has been brought in the Hospital at 9.30. P.M. and, therefore, necessary action be taken. This Yadi Ex.50 was received by P.S.O. of Bilimora Police Station at 21.45 hours. As per the copy of F.I.R. sent to the learned J.M.F.C., Gandevi, the complaint Ex.57 was lodged in the Police Station at 22.30 hours on 09.06.1992. Though Yadi Ex.50 was received at about 21.45 hours, police did not take any action. P.S.O. could have given direction to P.S.I. to go to Mangusi General Hospital, Bilimora to take the complaint of injured Prakash. Instead of going to Mangusi General Hospital, Bilimora, P.W.8 Sr. P.S.I. Brahmbhatt waited in the Police Station till Somiben reached the Police Station. P.W.1 Somiben has categorically deposed in her deposition that on receiving an information from Chetan (P.W.4), she immediately went to the place of incident. It is the case of the prosecution that the incident took place at about 21.00 hours. On reaching the place of incident, Somiben saw that Prakash was seriously injured and there was bleeding from his abdomen. She has deposed that immediately, she went to the police station and lodged her complaint. She has made it clear in para-10 of her cross-examination that she went to police station on foot and for reaching police station on foot one would take 15 to 20 minutes and, therefore, she must have reached the police station latest by 9.30. P.M. P.S.O. received Yadi Ex.50 from Chief Medical Officer of Mangusi General Hospital, Bilimora at 9.45 P.M. In view of this, the complainant was very much present in Police Station, when P.S.O.. received that Yadi Ex.50. P.S.I. Brahmbhatt waited for further 45 minutes in taking down complaint of Somiben. This delay of 45 minutes is not explained by the prosecution. P.W.1 Somiben has deposed in para-9 of her cross-examination that on 9th, when she went to police station, police did not take down her complaint as per her dictation and police informed her that they would write the complaint. She has also admitted in her

evidence that some part of writing was taken down in her presence. In view of this, it appears that Sr. P.S.I. started to take down the complaint at 22.30 hours and at that time, there was no specific case against any of the accused and, therefore, the police told Somiben that they would write the complaint later on. In view of this, whatever facts stated by Somiben immediately after reaching the police station at about 9.30 P.M., was in real sense a F.I.R. and subsequently, what is written down by police in complaint Ex.57, cannot be said to be a F.I.R. At the best it can be said that subsequently what was written down by the police is a further statement of Somiben. From the evidence, it clearly appears that Sr. P.S.I. Brahmbhatt had received a complaint Ex.57 from Somiben at 9.30. P.M. He did not take down that complaint at that very point of time. In view of this, the delay of about 45 minutes is fatal to the prosecution. It appears that subsequently, the case is cooked up against the accused.

25. As per the case of the prosecution, P.W.1 Somiben has lodged her complaint Ex.57 at about 22.30 hours on 09.06.1992. In this complaint, she has stated that one boy residing in her neighbourhood, who is known to her came to her and informed her that some quarrel had taken place with Prakash and he had been injured by infliction of knife blows. If, this was the statement made by Somiben in her complaint, Sr. P.S.I. Brahmbhatt should have asked her to show that boy because as per Somiben that boy was residing in her neighbourhood. For a moment, if, it is believed that Somiben had sustained mental shock and due to that she could not give the name of that boy, but she could have certainly shown that boy to P.W.8 Sr. P.S.I. Brahmbhatt. It is the case of the prosecution that boy P.W.4 Chetan, is a son of daughter of Somiben. It is interesting to note that Sr. P.S.I. Brahmbhatt recorded the statement of P.W.5 Ramesh on the next day i.e. on 10.06.1992, but the statement of P.W.4 Chetan came to be recorded on 11.06.1992. P.W.8 Sr. P.S.I. Brahmbhatt has deposed that he recorded the statement of Ramesh after drawing a panchnama of the scene of offence, which is produced at Sr.No.2 with the list Ex.22. That Mark-22/2 is not proved and not admitted in evidence. To prove this panchnama mark 22/2, the prosecution examined P.W.3 Chetan Babubhai, who turned hostile. He has not supported the case of the prosecution and, therefore, mark 22/2 is not admitted in his evidence. P.W.8 Sr. P.S.I. Brahmbhatt has deposed in para-5 of his deposition that mark 22/2 being a panchnama of the scene of offence was drawn in the presence of panch witnesses and it was written down as

per the dictation of panch witnesses and it bore their signatures and his signature. He has not deposed that panch witnesses signed that panchnama in his presence. He has not stated that the contents of panchnama were true and correct. Hence, Mark 22/2 panchnama is not rightly admitted in his evidence. This panchnama of the scene of offence at mark 22/2, was drawn during the period between 10.30 A.M. and 11.30 A.M. on 10.06.1992 and, therefore, the statement of P.W.5 Ramesh might have been recorded after 11.30 A.M. on 10.06.1992. P.W.8 Sr.P.S.I. Brahmbhatt has further deposed that on 10.06.1992, he had called Amrat, Champak and Chetan Ashokbhai for recording their statements, but that witnesses told him that they would give their statements, after consulting their advocate. He has further admitted that he recorded the statements of the said witnesses on 11.06.1992. If these witnesses had given their statements after consulting their advocate on 11.06.1992, naturally, some story must have been cooked up by the witnesses so as to implicate the accused. As per the evidence of P.W.8 Sr. P.S.I. Brahmbhatt, he recorded statement of Chetan Ashokbhai on 11.06.1992. He has further admitted that it was true that very statements recorded of five witnesses, complainant and Ramesh had not disclosed the name of Chetan Ashokbhai. Under the circumstances, till 11.06.1992, Somiben did not identify that young boy, who came to her and informed her about the incident. Thus, P.W.4 Chetan is a got up witness, so as to pose him as an eye witness, subsequently. P.W.5 Ramesh was confronted with his police statement and he has denied that he raised cries and, thereafter, a son of his sister Padma came running there. P.W.8 Sr. P.S.I. Brahmbhatt has deposed in para-8 of his deposition that Ramesh did not state in his statement before him that he raised cries and a son of his sister came running there. From this evidence, it clearly appears that P.W.4 Chetan was not present at the place of incident. The statement of P.W.4 Chetan was recorded on 11.06.1992 and, therefore, his evidence is not reliable and his evidence does not inspire any confidence of this court. P.W.5 Ramesh has admitted that when the incident took place, there were five persons present there and out of that five persons, they two brothers and three accused were present there. In view of this, presence of P.W.4 Chetan is not very much doubtful. From the evidence, it appears that subsequently, this P.W.4 Chetan has been projected as an eye witness and, therefore, this Court is of the considered view that it would be hazardous and risky to rely on the words of P.W.4 Chetan, who projected himself as an eye witness on 11.06.1992.

25. P.W.5 Rameshbhai Bhikhubhai is an elder brother of deceased Prakash and son of the complainant Somiben. He is highly interested witness. His evidence requires some corroboration from the independent witnesses. It is the case of the prosecution that after raising cries by Ramesh, about 10-12 persons had gathered there but none of them has been examined by the prosecution. P.W.5 Ramesh has deposed that he lifted Prakash (deceased) and put him in the Rickshaw for taking him to Hospital and at that time, his clothes had become stained with blood. The I.O. has not seized that blood stained clothes of Ramesh. P.W.1 Somiben lodged her complaint at 22.30 hours on 09.06.1992. In her complaint Ex.57, she has stated that on reaching the place of incident, she saw that Prakash, who was injured and bleeding condition, was lying on the road and at that time, his third son Ramesh was seen by her present there and she inquired from Ramesh and thereupon, Ramesh informed her that he and Prakash were coming from Talkies to "Khada" and meanwhile, Farid got excited and injured Prakash by knife. Thus, the name of Ramesh was disclosed, at the earliest point of time, when Somiben lodged her complaint Ex.57. He was present through out in the Hospital, till Prakash expired. It was the prime duty of I.O. to immediately contact Ramesh to know as to how the incident took place. It is interesting to note that Sr. P.S.I. Brahmbhatt did not record the statement of Ramesh, till 11.30 A.M. of the next day. P.W.5 Ramesh has admitted that his statement was recorded eighteen hours after the incident. The prosecution has not offered any explanation as to why the statement of this important and material eye witness was not recorded at the earliest point of time, though he was very much available in the Hospital till Prakash died. This casts a serious doubt on the evidence of P.W.5 Ramesh. He has admitted that when his mother came at the place of incident, he did not inform her that Babu Dayal (A-3) had caught hold Prakash. Thus, the involvement of Babu (A-3) is, after thought because the statement of P.W.5 Ramesh, was recorded on the next day.

26. This witness Ramesh (P.W.5) has deposed that Farid (A-1) had inflicted knife blows. He has identified muddamal article No.7 as that knife which was used in the commission of crime. On referring muddamal pavti Ex.4, we find that this muddamal article is not a knife, but it is a dagger. P.W.8 Sr. P.S.I. Brahmbhatt has admitted in his evidence that it was true that it was disclosed from the statements of witnesses recorded by him that the knife was used in the crime, while he has attached and seized the dagger . So there is a material contradiction

in between the description of weapon given by witness Ramesh and description of weapon attached and seized by I.O. The prosecution has produced discovery panchnama Mark 22/5. It is not admitted in the evidence. To prove this panchnama, the prosecution has examined panch witness P.W.6 Prakash Amratlal, Ex.45. This witness had turned hostile. He has not proved this panchnama. P.W.8 P.S.I. Brahmbhatt has tried to prove this panchnama at (mark 22/5) in para-3 of his evidence. While giving evidence, he has not given the evidence on the required ingredients to prove panchnama under Section 27 of the Indian Evidence Act and, therefore, the learned Judge of the trial Court has rightly not admitted this document in evidence. For a moment, if it is believed that this dagger was seized at the instance of accused No.1, it cannot be said that it was used by him in commission of the crime. This dagger was sent to F.S.L. for analysis. As per report Ex.43 of F.S.L., there was no blood on this muddamal article No.8 described as "dagger" and, therefore, question does not arise for detecting group of blood. In view of this, the muddamal article cannot be said to have been used in commission of the crime. As said earlier, there is complete variance in between the description of knife given by P.W.5 Ramesh and description of dagger given by I.O. in muddamal pavti Ex.4.

27. In view of what is stated hereinabove, the evidence of P.W.5 Ramesh does not get any corroboration from any of independent witness or evidence. He is highly interested witness. If, he could implicate the A-3 later on possibility of falsely implicating A-1 and A-2 by him, cannot be ruled out. In view of this, this witness is not reliable and trustworthy and, therefore, if the evidence of this evidence is excluded then there is no evidence on record to connect the A-1 with the crime. We find that the evidence led by the prosecution is not trustworthy and reliable and, therefore, this is a case in which benefit of doubt should be extended to the accused No.1.

28. We have noticed one important aspect from the evidence on record. P.W.7 Dr. Tandel, who performed postmortem of deadbody of deceased Prakash, has deposed in his evidence that from stomach of the deceased Prakash, undigested food material without smell of alcohol was found and on the basis of this, he has opined that undigested food material was consisting of different types of food and that deceased must have taken food 3 to 6 hours before his death. It is the case of the prosecution that Prakash died during the period in

between 01.00 A.M. and 1.30 A.M. on 10.06.1992. Hence, deceased must have taken food during the period between 19.30 hours and 22.30 hours on 09.06.1992. Normally, one would take lunch in between 12.00 P.M. and 13.00 P.M. It is not the case of the prosecution that on the date of incident, deceased Prakash had taken lunch before 19.30 hours. P.W.5 Ramesh has deposed in his evidence that when they were coming from Talkies to Khada, they had not taken meals, and after reaching their house they had to take meals. He has further deposed that Prakash was not given any food, while he was in the Hospital. P.W.1 Somiben has deposed that when she went to the Hospital, she found that Prakash was alive. Under the circumstances, the prosecution has suppressed certain material facts of the case. It is not the case of the prosecution that in between the period of 19.30 hours and 22.30 hours, deceased Prakash had taken some food. On the contrary, there is an evidence that they had not taken any food before the incident and, therefore, doubt is cast for actual commission of an offence. If the deceased Prakash had taken lunch in between 12.00 P.M. and 13.00 P.M. then the incident must have taken place round about in between 16.00 hours and 19.00 hours. This is not the case of the prosecution and, therefore, a serious doubt is raised as to what type of incident and when it took place. Looking to the above discussed evidence and in view of the evidence of Dr.Tandel, the case has become highly doubtful. If this is the evidence then, the benefit of doubt must be given to the accused.

29. From the very beginning, it was the case of the prosecution that the A-3 Babu Dayal had caught hold of deceased Prakash and A-1 had inflicted knife blows on the body of Prakash and thereby A-3 Babu has abetted A-1 in committing murder of Prakash. It is also the case of the prosecution that at the time of incident A-2 Salim had caught hold of P.W.5 Ramesh, who was present there at the place of incident, when the incident took place. It is not the case of the prosecution that P.W.5 Ramesh was trying to save the deceased Prakash and while doing so, A-2 Salim had caught hold of him and thereby he was prevented to save deceased Prakash by rendering his help. P.W.5 Ramesh is a witness and if A-2 Salim had caught hold of one witness, it cannot be said that he abetted A-1, while committing an offence of murder of deceased Prakash.

So far as case against A-3 Babu is concerned, his name does not appear in F.I.R., which was lodged, as per the case of the prosecution, at the earliest point of time. It is the say of P.W.1 Somiben that on hearing the news from P.W.4 Chetan, she rushed, on the spot, and saw

that Prakash was lying in injured and bleeding condition. It is her say that at that time, her elder son P.W.5 Ramesh was there nearby the place of incident and she inquired from him as to what had happened to Prakash. It is her say that P.W.5 Ramesh informed her that Farid and Salim had caught hold of Prakash. She is not clear in her deposition as to who was caught hold of by Salim. P.W.5 Ramesh, who was confronted with police statement, denied that it was not true that when his mother rushed to the place of incident within five minutes, he did not inform her that Babu had caught hold of Prakash. P.W.8 P.S.I. Brahmbhatt has deposed in para-8 of his deposition about the facts stated by Ramesh in police statement before him. In that police statement, he did not state that he informed her mother that Babu (A-3) had caught hold of deceased Prakash.

On overall appreciation of evidence on record, we are of the view that Criminal Appeal No.706 of 1994 being meritless, deserves to be dismissed and accordingly, it is dismissed.

CRIMINAL APPEAL NO.936 OF 1994 :

30. The learned Judge of the trial Court has discussed the evidence qua A-2 and A-3 in para-11 of his judgment. The learned Judge of the trial Court has, by assigning cogent and convincing reasons, came to a conclusion that it is not disclosed from the evidence on record that A-2 and A-3 had taken part in the incident of murder of deceased Prakash committed by A-1. He has, therefore, come to a conclusion that the prosecution has failed to prove the case with regard to abetment against A-2 and A-3 beyond reasonable doubt and, therefore, he has acquittal A-2 and A-3.

31. We are conscious of the facts that this appeal i.e. Criminal Appeal No.936 of 1994 filed by the State, against the judgment of acquittal rendered by the learned Judge of the trial Court in Sessions Case No.84 of 1992 in favour of A-2 and A-3. It is well settled principle of law that in acquittal appeal, the Court should be very slow in interfering with the findings arrived at by the learned Judge of the trial Court, who had an advantage of seeing the demeanour and conduct of the witnesses. It is also settled principle of law that when the learned Judge of the trial Court has assigned cogent and convincing reasons for his findings to render his judgment of acquittal, then this Court cannot substitute its own as if it were a trial Court. It is also a well settled principle of law that when there two views are possible, then view which is favourable to accused should be

preferred. We find no substance to interfere with the judgment of acquittal. In view of this, this appeal filed by the State of Government lacks of merits and it requires to be dismissed and accordingly it is dismissed.

32. For the foregoing reasons, Criminal Appeal No.706 of 1994 deserves to be allowed and it is allowed. The judgment of conviction and sentence operative against the appellant / accused No.1 is hereby quashed and set aside. The appellant / accused No.1 be set free forthwith if he is not required in custody for any other case or purpose.

Criminal Appeal No.936 of 1994 deserves to be dismissed against the respondent No.1. As discussed earlier this appeal stands abated under Section 394 of Cr.P.C. against the respondent No.2. The judgment dated 30.06.1994 of acquittal rendered in favour of accused Nos.2 and 3 (both the respondents), by the learned Additional Sessions Judge, Valsad at Navsari in Sessions Case No.84 of 1992 is confirmed. Muddamal article be disposed of as per the directions given by the learned Judge of the trial Court in operative part of his impugned judgment.

[M. H. Kadri,J.] [H. H. Mehta,J.]

(vijay)